

April 2019

Constitutional Law--The Eleventh Amendment-- Injustice for All

Devon L. Gosnell

West Virginia University College of Law

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Recommended Citation

Devon L. Gosnell, *Constitutional Law--The Eleventh Amendment--Injustice for All*, 77 W. Va. L. Rev. (2019).

Available at: <https://researchrepository.wvu.edu/wvlr/vol77/iss4/6>

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STUDENT NOTES

CONSTITUTIONAL LAW — THE ELEVENTH AMENDMENT — INJUSTICE FOR ALL

Can we forget for whom we are forming a Government? Is it for
men, or for the imaginary beings called *States*?

James Wilson¹

The concept of sovereign immunity has long been a vibrant force in American law, overshadowing the inequities it created by the theory that government was responsible only for those wrongs it chose to recognize from a moral consciousness inherent within the state. When the thirteen colonies banded together to form the union known as the United States of America, state government played a relatively minor role in the lives of the people. Of the few disputes that did arise between states and citizens, mainly payment of bond obligations incurred during the Revolutionary War, most were settled out of court.² As the role of government in the lives of its people has expanded, so have the claims against the state for wrongs done by the state to the people. However, when recovery has remained a matter discretionary with the state, an increasing number of wrongs committed have remained uncompensated. The state may simply choose not to recognize such wrongs, and the injured citizen is thus left without a remedy. The recent increase in civil rights legislation has demonstrated the shortcomings inherent in a system where the wrongdoer alone is left to decide whether to make redress for the damages it has caused. At best, such a system provides incongruous relief to those similarly injured; at worst, all recovery is denied.

Federal and state governments have begun chipping away at the immunity doctrine through both the legislature and the judiciary. One great obstacle, however, still stands in the way of providing relief to those injured by acts of government. The eleventh amendment to the United States Constitution³ remains immova-

¹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 483 (M. Farrand ed. 1937).

² C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 69 (1972) [hereinafter cited as JACOBS].

³ U.S. CONST. amend. XI provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

ble in the face of this expanding scope of recovery for wrongs committed by government upon its people. Because of its constitutional nature, it has withstood all direct attacks upon a state's sovereign immunity in the federal courts, yielding only to the creation of fictions by which its effect is circumnavigated.⁴ The hardships⁵ it has wrought have far outweighed the good it was to have brought when incorporated into the Constitution in 1798. This note will examine the reasons for the passage of the amendment and its subsequent ramifications in American law. Its contemporary effects will be noted, particularly with reference to civil rights actions. Attention will also be directed to potential solutions to the problems it has created and continues to foster.

I. HISTORICAL BACKGROUND OF THE ELEVENTH AMENDMENT

The eleventh amendment to the United States Constitution was adopted in 1798, a direct result of the United States Supreme Court decision in *Chisholm v. Georgia*,⁶ permitting recovery of a debt by the executors of a South Carolina citizen against the State of Georgia. Whatever had been the intention of the framers of the Constitution with respect to the suability of the state, the eleventh amendment was intended to settle the question in favor of state sovereign immunity.⁷ The amendment was meant to reverse the Court's holding in *Chisholm* and to return the states to their prior status. That status, however, became conclusive only as a result of the amendment. Prior to *Chisholm*, the question of suability was an open one, merely waiting for a challenge in which the interpretation of section two, article three of the Constitution could be finalized.

Article three, section two of the United States Constitution provides in part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State

prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

⁴ See notes 134-47 *infra* and accompanying text.

⁵ See notes 185-86 *infra* and accompanying text.

⁶ 2 U.S. (2 Dall.) 419 (1793).

⁷ JACOBS at 65-69.

The section lends itself to two views of interpretation, one based on a literal reading, the other couched in the background of English legal history. Depending upon which view is adopted, one will find the state either amenable to suit or immune absent its consent to be sued. The Court in *Chisholm* adopted the literal interpretation; the eleventh amendment was based on the historical rationale. Both theories found support among the framers of the Constitution who apparently came to no final decision regarding its meaning.⁸

A. The Debates in the State Conventions

After the drafting of the Constitution was completed in 1787, there remained the arduous task of obtaining the approval of the conventions of nine states to implement the Constitution. Vigorous debates over its ratification followed in several states, but the federal judiciary was one of the lesser discussed topics.⁹ A primary weakness of the Articles of Confederation had been the lack of a federal judiciary, and most delegates acknowledged the need for reform in this area in the new Constitution.¹⁰ The issue of the suability of a state was not overlooked entirely, however, as it was discussed in the conventions of at least six states.

Pennsylvania was the first of the states to criticize the judiciary article, but few of these criticisms centered on the extension of the judicial power to controversies between a state and citizens of other states or foreigners. James Wilson, who later sat on the United States Supreme Court when the *Chisholm* case was decided, nevertheless chose to explain the effect of the article to the convention. Regarding controversies between a state and citizens of another state, he noted: "When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a joint and equal footing."¹¹ Objection was made to jurisdiction of disputes to which the United States was a party based on the ground that "the sovereignty of the states is destroyed, if they should be engaged in a controversy with the United States, because a suiter in a court must acknowledge the jurisdiction of that court, and it is not the custom of sovereigns to suffer their

⁸ See notes 9-47 *infra* and accompanying text.

⁹ JACOBS at 27.

¹⁰ JACOBS at 22.

¹¹ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 491 (J. Elliot ed. 1876) [hereinafter cited as DEBATES].

names to be made use of in this manner.”¹² Wilson replied, “The answer is plain and easy: the government of each state ought to be subordinate to the government of the United States.”¹³

Wilson expounded upon these views in 1791, only two years prior to *Chisholm*. When a state or the nation is party to a dispute, “the state or nation ought itself to be amenable before the judicial powers. This principle, dignified because it is just is expressly ratified by the constitution of Pennsylvania. It declares that suits may be brought against the commonwealth.”¹⁴ With regard to the sovereignty of the states, he said:

The dignity of the state is compounded of the dignity of its members. If the dignity of each singly is undiminished, the dignity of all jointly must be unimpaired.

Is a man degraded by the manly declaration, that he renders himself amenable to justice? Can a similar declaration degrade a state?

To be privileged from the awards of equal justice, is a disgrace instead of being an honor; but a state claims a privilege from the awards of equal justice, when she refuses to become a party¹⁵

Apparently the Pennsylvania convention was satisfied with Wilson’s explanation of the judicial power encompassed within the Constitution; they ratified it without qualification. Although the anti-Federalists proposed several amendments, none of which were adopted, not one dealt with the extension of judicial power to controversies between a state and citizens of another state.¹⁶

There is no record that Massachusetts considered the suability question in its convention. While the provision was not without criticism from prominent citizens,¹⁷ the Constitution was ratified with the article in its original form.

In Virginia the suability doctrine met perhaps its stiffest opposition. Edmund Randolph first raised the subject of the judiciary article on June 10, 1788.¹⁸ Randolph favored it highly because he believed it would force Virginia to pay her debts, prevent the im-

¹² *Id.* at 490.

¹³ *Id.*

¹⁴ 2 THE WORKS OF JAMES WILSON 151 (J. Andrews ed. 1896).

¹⁵ *Id.* at 153.

¹⁶ See JACOBS at 29.

¹⁷ JACOBS at 30-31.

¹⁸ 3 DEBATES at 207.

pairment of contracts by states, and prohibit tender laws.¹⁹ Patrick Henry was thoroughly alarmed over the proposition. On June 12, he stated: "A state may be sued in the federal court, by the paper on your table. It appears to me, then, that the holder of the paper money may require shilling for shilling. If there be any latent remedy to prevent this, I hope it will be discovered."²⁰ The problem that Henry feared was that Virginia and other states might be required to redeem the depreciated Continental paper and other obligations at face value. On June 17, he continued in the same vein, convinced that the Northerners holding the depreciated currency could sue and obtain judgment in federal court against the state.²¹ The only apparent escape from this was by way of an *ex post facto* law that was itself prohibited by the Constitution.²²

George Nicholas, a proponent of ratification, answered Henry that the Continental debts were those of Congress, and it alone would determine the ones that were valid.²³ He perceived no authority in the judiciary act permitting Congress to be sued in the very courts it created. He noted that Congress could be the plaintiff in a suit but not a defendant. "But the individual states, perhaps, may be sued."²⁴ President Edmund Pendleton found the judiciary article applicable to matters of "general and not local concern;" "the necessity and propriety of a federal jurisdiction, in all such cases, must strike every gentleman."²⁵

What struck George Mason was not the "necessity and propriety" of the federal jurisdiction, but the absurdity of its apparently unlimited scope. Jurisdiction of disputes between a state and citizens of another state was "utterly inconsistent with reason or good policy."²⁶ Although he believed that the British debts should be paid, enforcement of a judgment against a state created a practical problem. "It would be ludicrous to say that you could put the

¹⁹ Tender laws required acceptance of paper money on an equal basis with specie. As the paper money depreciated with each additional issuance, creditors began refusing to accept it despite the state law. F. BATES, *RHODE ISLAND AND THE FORMATION OF THE UNION 147-48* (Studies in History, Economics and Public Law No. 27, 1898).

²⁰ 3 DEBATES at 319.

²¹ *Id.* at 461, 474-75.

²² *Id.*; U.S. CONST. art. I, § 10.

²³ 3 DEBATES at 476.

²⁴ *Id.* at 477.

²⁵ *Id.* at 518.

²⁶ *Id.* at 523.

state's body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted."²⁷

James Madison felt that Mason's attack upon the judiciary was perhaps unwarranted. He stated:

It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. . . . It appears to me that this can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.²⁸

Patrick Henry was unconvinced by Madison's remarks, particularly in reference to a state being plaintiff only in the federal courts:

If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that gentlemen may put what construction they please on it.²⁹

Another attempt was made to allay the fears of the anti-Federalists that the judicial power would allow the states to be brought into federal court by a private citizen. John Marshall told the convention that he hoped "that no gentleman will think that a state will be called at the bar of the federal court.

. . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states."³⁰

²⁷ *Id.* at 527. Mason proposed the following amendment:

[T]he judicial power shall extend to no case where the cause of action shall have originated before the ratification of this Constitution, except in suits for debts due to the United States, disputes between states about their territory, and disputes between persons claiming lands under grants of different states. In these cases there is an obvious necessity for giving it retrospective power.

3 DEBATES at 530.

²⁸ 3 DEBATES at 533.

²⁹ *Id.* at 543.

³⁰ *Id.* at 555.

Randolph did not concur in this conclusion noting, "[W]hatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff and not defendant is taken away by the words *where a state shall be a party*."³¹ No further comment on the provision was made during the Virginia convention, but it is evident that even the Federalists were unable to agree among themselves regarding the correct interpretation of the phrase. Nevertheless, Virginia ratified the Constitution. While an amendment was made that would have removed federal jurisdiction from state-citizen controversies, adoption of this and other amendments was not made a prerequisite to ratification.

New York also encountered considerable anti-Federalist sentiment toward ratification. No discussion of state suability is recorded in the convention records, but the issue was not ignored. *Letters of a Federal Farmer*, an anti-Federalist tract written by Virginian Richard Henry Lee and widely circulated in New York, questioned the wisdom of permitting a state to be sued by a foreigner or citizen of another state.³² The writer was concerned about debts incurred during the war that had now been defaulted upon. As such remedies had not been considered by either the states or their creditors when the contracts were made, Lee believed "the new remedy proposed to be given in the federal courts, can be founded on no principle whatever."³³

After treating the subject superficially in *The Federalist*, Number 80, Alexander Hamilton went into some detail in Number 81³⁴ to assure the anti-Federalists that nothing in the new Constitution would permit suits to be brought against a state where the right had not existed previously. Hamilton believed that it was beneath the dignity of a state to be brought before one of the lower courts. In a vigorous assertion of state sovereignty, he said:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of

³¹ *Id.* at 573.

³² Lee, *Letters of a Federal Farmer*, in *EMPIRE AND NATION* 117 (W. Leuchtenberg and B. Wishy eds. 1970).

³³ *Id.*

³⁴ *THE FEDERALIST* No. 81, at 119 (M. Dunne pub. 1901) (A. Hamilton).

the convention, it will remain with the States, and the danger intimated must be merely ideal.³⁵

New York evidently feared, as Virginia did, that the new Constitution provided for suits against the state, because an amendment was proposed that would have removed such jurisdiction.³⁶ The Constitution was ratified without the amendment, although New York did call for a second federal convention to make changes in the document.³⁷ While neither Virginia nor New York adopted amendments affecting federal jurisdiction, both states felt compelled to propose amendments that would have deleted the questioned provision. Undoubtedly, if neither state had believed the federal judicial power encompassed disputes between a state and other citizens or foreigners, they would not have bothered to recommend amendment of the phrase.

North Carolina originally rejected the Constitution, refusing to ratify it until 1789, after the establishment of the new government.³⁸ Fear of suits brought against the state for redemption of war debts was an important issue. Most discussions of the problem were rather general, however, with only one delegate, William R. Davie, a Federalist, recorded as commenting on the question.³⁹ He believed the provision “necessary to secure impartiality in decisions, and preserve tranquillity among the states.”⁴⁰ His was not the majority viewpoint,⁴¹ however, and a proposed amendment limiting federal judicial power would have deprived the courts completely of jurisdiction in such matters.⁴²

³⁵ *Id.* at 125-26.

³⁶ See JACOBS at 37. By a vote of 31-29 the New York Convention had previously refused to approve a motion limiting the state’s obligations under the new federal government until a second convention could be called to consider amendments. 2 DEBATES at 411-12.

Amendments proposed by Delegate Samuel Jones included:

Res. 4. *Resolved*, as the opinion of this committee, that nothing in the Constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any manner whatever.

Res. 5. *Resolved*, as the opinion of this committee, that the judicial power of the United States, in cases in which a state shall be a party, is not to be construed to extend to criminal prosecutions.

Id. at 409.

³⁷ 2 DEBATES at 413-14.

³⁸ See JACOBS at 38.

³⁹ See JACOBS at 37.

⁴⁰ 4 DEBATES at 159.

⁴¹ JACOBS at 38.

⁴² The proposed amendment read:

Rhode Island did not even call a state convention concerning ratification of the Constitution until 1790.⁴³ One proposed amendment stated that “the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state.”⁴⁴ Rhode Island, a paper money state, feared the extension of federal jurisdiction as it perceived it under the new Constitution because of the potential adverse effect on its money situation.⁴⁵

The anti-Federalists clearly believed the states to be suable under the judiciary article. The Federalists were divided, with Randolph, Mason, Wilson, and Henry (not a delegate to the Philadelphia convention) agreeing with the anti-Federalists,⁴⁶ while Madison, Hamilton, and Marshall (also not a delegate) arguing that the provision extended federal jurisdiction over the state in a suit by a citizen no further than it had reached prior to the Constitution.⁴⁷ There was no resolution of the issue. The fears entertained by each delegate were apparently placated sufficiently to permit most of them to vote for ratification. The overriding point is that one who depends upon the Framers for the interpretation of the phrase extending federal judicial power “to Controversies between a State and Citizens of another State” receives little guidance. The Framers themselves could not agree on the meaning. With such confusion over the issue, it is evident that the prevailing opinion regarding the suability of the states was not one of sovereign immunity, as would later be proclaimed by defenders of state immunity.

That the judicial power of the United States shall be vested in one Supreme Court and in such courts of admiralty as Congress may from time to time ordain and establish in any of the different states. The judicial power shall extend to all cases in law and equity arising under treaties made, or which shall be made, under the authority of the United States; to all cases affecting ambassadors, other foreign ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, and between parties claiming lands under the grants of different states.

⁴³ 4 DEBATES at 246.

⁴⁴ See JACOBS at 38-39.

⁴⁵ *Id.*

⁴⁶ See F. BATES, *supra* note 19, at 107-48.

⁴⁷ See notes 9-27 *supra* and accompanying text.

⁴⁸ See notes 28-30, 34, 35 *supra* and accompanying text.

B. The Suits Against the States

The Judiciary Act, implementing Article III of the Constitution, was adopted by Congress in 1789.⁴⁸ Its terms are no more lucid than those of the Constitution, thus leaving the suability question unanswered. It is within this equivocal framework that the first case naming a state as defendant arose.

*Vanstopphorst v. Maryland*⁴⁹ was instituted in 1791 by two Dutch creditors seeking recovery of loans made to Congress and the states during the War. The governor, executive council, and attorney general of the state were served without protest. This was the first case in which the United States Supreme Court asserted jurisdiction over a state, but its effect was somewhat muted by Maryland's recognition of the debt and eventual payment.

New York was next, being sued in *assumpsit* by the administrator of the estate of a Pennsylvania citizen.⁵⁰ New York was not complacent about the matter, protesting jurisdiction vehemently, but judgment was nevertheless entered against the state. New York's objections to the suit were minor compared to those of Georgia when *Chisholm v. Georgia*⁵¹ was instituted in August 1792.⁵² New York had appeared to defend on the issue of jurisdiction, but Georgia refused any appearance. The state was outraged over the case and apparently felt that any appearance on its part would be a humiliating concession.

The facts of *Chisholm* are unclear, but one authority states that the suit was brought by Alexander Chisholm, executor of the estate of Robert Farquhar, a deceased South Carolina merchant who had supplied Georgia with war supplies in 1777.⁵³ Farquhar had not been paid for the supplies, and his executor brought suit for payment against the State of Georgia in the United States District Court for the Georgia District. Georgia asserted immunity, and the circuit court agreed with the state and dismissed the ac-

⁴⁸ Act of Sept. 9, 1789, ch. 20, 1 Stat. 73.

⁴⁹ 2 U.S. (2 Dall.) 401 (1791).

⁵⁰ *Oswald v. New York*, 2 U.S. (2 Dall.) 401 (1792). "The facts of *Oswald v. New York* were not reported by Dallas. The background of the case has been reconstructed from the *Oswald v. New York* case file in the National Archives. The file is incomplete, however, and many of the documents were badly damaged by fire." JACOBS at 45n.13.

⁵¹ 2 U.S. (2 Dall.) 419 (1793).

⁵² JACOBS at 46. 2 U.S. (2 Dall.) 419.

⁵³ JACOBS at 47.

tion. Chisholm filed an original bill in the United States Supreme Court and retained Attorney General Edmund Randolph as counsel. Randolph argued for default judgment when the state failed to appear. While recognizing that he represented an unpopular position, he stated that normally the opinions of other states might influence him; "but on this, which brings into question a constitutional right, supported by my own conviction, to surrender it would in me be official perfidy."⁵⁴

The motion for default judgment discussed four issues that the Court had designated previously for argument. Only one received extensive treatment—whether the State of Georgia could be made a defendant in a case before the United States Supreme Court brought by a private citizen. The argument had a dual basis:

1st. That the Constitution vests a jurisdiction in the Supreme Court over a State, as a defendant, at the suit of a private citizen of another State.

2d. That the judicial act recognizes that jurisdiction.⁵⁵

Randolph began by analyzing the "letter of the Constitution, or rather the influential words of the clause in question."⁵⁶ He found nothing in the language that would yield an interpretation permitting states to be only plaintiffs in a suit. The Constitution extended federal jurisdiction over cases in which a state was a party, and a defendant was as much a party as a plaintiff.

He then turned to the spirit of the Constitution, which he called its "genuine and necessary interpretation."⁵⁷ After enumerating various unconstitutional acts that a state might commit, he concluded:

Are States then to enjoy the high privilege of acting thus eminently wrong, without controul; or does a remedy exist. The love of morality would lead us to wish that some check should be found; if the evil, which flows from it, be not too great for the good contemplated. The common law has established a principle, that no prohibitory act shall be without its vindicatory quality; or in other words, that the infraction of a prohibitory law, although an express penalty be omitted, is still punishable.⁵⁸

⁵⁴ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 419-20 (1793).

⁵⁵ *Id.* at 420.

⁵⁶ *Id.*

⁵⁷ *Id.* at 421.

⁵⁸ *Id.* at 422.

Randolph went on to point out problems that would arise if private citizens were left without a remedy against the state. For example, if a state impaired the obligation of her own contracts, a suit against the state would be the only way to rectify such a situation.

In his argument before the Supreme Court, Randolph observed that there was no question that one state could sue another, which, he reasoned, should also permit an individual wronged by a state to sue the state. He continued:

A distinction between the cases is supportable only on a supposed comparative inferiority of the Plaintiff. But the framers of the Constitution could never have thought thus. They must have viewed human rights in their essence, not in their mere form. They had heard, seen—I will say felt; that Legislators were not so far sublimed above other men, as to soar beyond the region of passion. Unfledged as *America* was in the vices of old Governments, she had some incident to her own new situation: individuals had been victims to the oppression of States.⁵⁹

Randolph was appealing to the reason of the Court, reminding it that states could and did commit unconstitutional acts and no reason existed why the right of the state should be superior to those of the people who had created the state. He believed that the states had surrendered a part of their sovereignty with the creation of the Union. While this alone was not sufficient reason to make the states suable, the language of the Constitution was, and he found no bar to a suit against the state within its discourse.⁶⁰

Default judgment was granted by the Court with only Justice Iredell dissenting. Iredell spoke first, basing his opposition on his belief that no legislature had authorized a compulsory suit to recover monetary relief at the time of the adoption of the Constitution or the passage of the Judiciary Act. The principles of law controlling could only be those common to all the states. He stated:

I know of none such, which can affect this case, but those that are derived from what is properly termed “the common law,” a law which I presume is the ground-work of the laws in every State in the *Union*, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislature controuls it, to be in force in each

⁵⁹ *Id.* at 422-23.

⁶⁰ *Id.* at 423-25.

*State, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country.*⁶¹

Iredell believed that the United States had only that authority expressly delegated to it by the states. He found no instance where any state legislature had given up its immunity and, therefore, found no historical basis for this immunity to be surrendered to the national government. He found the judicial authority of the United States to extend "only to the decision of controversies in which a State is a party"⁶² He interpreted this as bestowing jurisdiction only in those cases "in which a State *can* be a party"⁶³ No new remedies had been provided; as he saw it, the federal judicial power merely provided a forum for existing remedies. If a suit against the state could have been maintained at common law, then it could be maintained here. If not, then Iredell found that regardless of the interpretation given the Constitution and the power vested in Congress, such a suit was not authorized. The only remedy against the state's wrongful act was the type provided against the English crown, a Petition of Right.⁶⁴

Justice Iredell was alone in his interpretation of the suability question; Justices Blair, Wilson, and Cushing, and Chief Justice Jay rendered opinions supporting the expanded concept of federal jurisdiction. Justice Blair found the United States Constitution to be the only authority in question since all states had adopted it and thus submitted themselves to its judicial authority.⁶⁵ His argument was that "if sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the *United States*, she has in that respect, given up her sovereignty."⁶⁶

Justice Wilson began his opinion by asking, "[D]o the people of the *United States* form a *Nation*?"⁶⁷ He approached the issue from two angles: (1) the general jurisprudence and (2) laws and practice of particular States and Kingdoms. With respect to the

⁶¹ *Id.* at 435.

⁶² *Id.* at 436.

⁶³ *Id.*

⁶⁴ A discussion of the origin of the Petition and its status in England at the time of the adoption of the United States Constitution ensued as justification for his position. *Id.* at 437-46.

⁶⁵ *Id.* at 450.

⁶⁶ *Id.* at 452.

⁶⁷ *Id.* at 453.

general jurisprudence, he tackled the question of what is a state and then examined the concept of sovereignty. Combining the two ideas in the context of the current dispute, he concluded that “(a)s to the purposes of the Union . . . Georgia is NOT a sovereign state,” for the people of Georgia did not surrender the sovereign power to the state when forming the Union, but retained it for themselves.⁶⁸ Wilson acknowledged William Blackstone’s concept of a sovereign king in the English system who is immune from suit since no court has jurisdiction over him “for all jurisdiction implies superiority of power.”⁶⁹ He then set forth the principle that he found as “the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the Consent of those whose obedience they require. The *sovereign*, when traced to his source, must be found in the *man*.”⁷⁰ In the second phase of his analysis he considered the feudal source of sovereignty and instances in the European countries where such sovereignty was challenged and found to be less than absolute. The English permitted the King to be sued only by *Petition*, but he found this to be a “difference . . . only in the *form*, not in the thing.”⁷¹ Thus, even the King was not above the law.

Wilson suggested that the people of the states creating the Constitution, that included citizens of Georgia, could bind the states by the legislative, executive, and judicial power vested in the Constitution.⁷² The people could diminish or enlarge the power of the states, as well as extinguish or transfer it, and as he expressly noted, could “vest jurisdiction or judicial power over those States and over the State of *Georgia* in particular.”⁷³ He then questioned whether the Constitution had done this. It was his opinion that the people of the United States intended the Constitution to bind not only individuals but also the states by the legislative, executive, and judicial powers of the national government.⁷⁴

Justice Cushing, looking at the language of the Constitution itself, dismissed the theory that English common law should govern.⁷⁵ He found Article III to be an express limitation upon the

⁶⁸ *Id.* at 457.

⁶⁹ *Id.* at 458.

⁷⁰ *Id.* at 459.

⁷¹ *Id.* at 459-60.

⁷² *Id.* at 463.

⁷³ *Id.* at 464.

⁷⁴ *Id.*

⁷⁵ *Id.* at 466.

power of the states, no more severe than the restrictions with respect to treaties and the coining of money.⁷⁶

Chief Justice Jay posed three questions that he felt were essential to solving the problem of whether a state could be sued by a private citizen of another state. First, he inquired concerning the nature of the sovereignty of the state of Georgia; second, whether such sovereignty necessarily precluded suability; and third, whether the Constitution permits a suit against a state.⁷⁷ Examining the first question, he found sovereignty to be "the right to govern" which resided in a nation or state.⁷⁸ In Europe, such sovereignty was given the Prince, but, in the United States, it was accorded the people. He found governors to be agents of the people, holding no greater sovereignty than that which they enjoy as private citizens.⁷⁹

Because one state suing another state is nothing more than all the citizens of the first state suing all the citizens of the second state, he concluded that a state could be sued, and, consequently, suability and sovereignty were not incompatible. He could find no rationale for the distinction between permitting all the citizens of a state to sue another state while forbidding one citizen to sue a different state. He noted the inequality inherent in the result, particularly when the state could sue individual citizens.⁸⁰ Jay turned to the language of the Constitution for the answer to his third question. He asked why, if states were to be only plaintiffs in actions involving citizens, the Constitution did not so limit the federal jurisdiction. "[I]f it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the Constitution." He found the exception to the federal judicial power urged by the state to be in direct conflict with a major premise of the Constitution, the "establish[ment of] justice."⁸¹

Based upon a strict reading of the Constitution, and led in its interpretation by the principles of justice and unity underlying its

⁷⁶ *Id.* at 468.

⁷⁷ *Id.* at 470.

⁷⁸ *Id.* at 472.

⁷⁹ *Id.*

⁸⁰ Georgia was at that time suing two South Carolina citizens. *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 415 (1792), 3 U.S. (3 Dall.) 1 (1794).

⁸¹ 2 U.S. (2 Dall.) at 476-77.

construction rather than English common law, the Court rendered judgment for the plaintiff against the State of Georgia. The justices decided that sovereignty indeed rested in the people, and it was they who, creating both the state and the union, designated the powers to the governments. The people thus could create a national government that was superior in authority to the state governments and, through each state's ratification of the national Constitution, had expressly done so.

Entry of the default judgment against the state was delayed until February 1794, at which time a writ of inquiry for damages was awarded. The claim was settled by the state later that year, and the writ was never executed.⁸² The case remained on the Court's docket until 1798, when it was dismissed in *Hollingsworth v. Virginia*.⁸³

C. The Eleventh Amendment

Georgia's indignation over the decision was soon made apparent. When the Georgia legislature convened that fall, Governor Edward Telfair called for a state delegation to seek a constitutional amendment and urged other states to ratify it.⁸⁴ Resentment was so great that one section of the Georgia House bill provided for the death penalty to anyone attempting to levy on the state for the recovery of the Chisholm debt.⁸⁵ The bill was rejected in the Senate, but, by then, support for a constitutional amendment was increasing.

The wrath kindled in Georgia spread up the eastern seaboard as similar suits were instituted against other states. The day after the *Chisholm* decision, the Court ordered that default judgment be entered against New York in *Oswald v. New York*⁸⁶ unless the State appeared or showed cause for failure to do so.⁸⁷ Virginia was

⁸² JACOBS at 55.

⁸³ 3 U.S. (3 Dall.) 378 (1798). See notes 97-102 *infra* and accompanying text.

⁸⁴ JACOBS at 56.

⁸⁵ For the text of the bill, see JACOBS at 56, quoting from *The Augusta Chronicle*, November 23, 1793.

⁸⁶ 2 U.S. (2 Dall.) 401 (1792). See note 50 *supra*.

⁸⁷ With the plaintiff's consent, the case was continued until the February 1795 term. New York Governor George Clinton brought the matter to the attention of the state legislature, but no decisive action was taken to resolve the question whether the state would defend itself in the case. JACOBS at 45.

During the February 1795 term of the Court, a jury was impaneled to hear the *Oswald* case. An award in the amount of \$5,315 damages and

sued in *Grayson v. Virginia*⁸⁸ over the seizure of land for the public domain allegedly owned by a fur trading company, while Massachusetts was named defendant in *Vassal v. Massachusetts*, an action brought by a Loyalist whose property was confiscated during the war.⁸⁹ *Cutting v. South Carolina* was brought by the executor of the Prince of Luxembourg to recover a debt owed by South Carolina because of a vessel owned by it.⁹⁰ The final case to be brought before the eleventh amendment settled the question was also against Georgia. *Moultrie v. Georgia*⁹¹ involved the state's refusal to accept paper money in payment upon a contract for sale of land. The land was subsequently sold, and the plaintiffs brought suit for breach of contract.⁹²

Two days after the *Chisholm* decision was rendered, the following amendment was introduced in the United States Senate:

The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.⁹³

No action was taken on the proposed amendment, but the states refused to let the issue die. Massachusetts and Virginia, both facing suits in the Supreme Court, introduced a resolution during the Third Congress criticizing the Court's action. Various state legislatures responded with resolutions of their own, most of which concurred in the condemnation of the Court.⁹⁴

The final text of the amendment was proposed on January 2, 1794, and passed by both houses before spring.⁹⁵ With fifteen states

\$0.06 costs, was rendered for the plaintiff; but the Court still hesitating, entered judgment *nisi*, that is, a judgment to become effective unless the state appeared to contest it. No appearance was subsequently entered, and there is no record indicating whether the state satisfied the judgment against it.

Id. at 46 (footnote omitted).

⁸⁸ 3 U.S. (3 Dall.) 320 (1796). This case was later decided as *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

⁸⁹ JACOBS at 60. The case was docketed in the August 1793 term of the Supreme Court. It is discussed in the minutes of the Supreme Court, August 6, 1793.

⁹⁰ The case is unreported.

⁹¹ Also styled *Huger v. Georgia*, February 1797, Supreme Court docket. Part of the case is reported in *Huger v. South Carolina*, 3 U.S. (3 Dall.) 339 (1797).

⁹² JACOBS at 64.

⁹³ 3 ANNALS OF CONG. 651-52 (1793).

⁹⁴ JACOBS at 65.

⁹⁵ 4 ANNALS OF CONG. 25, 30, 476-77 (1794).

now in the Union, twelve were needed for ratification. Although the required number was attained that year, the amendment was not officially adopted until 1798, because of the slow process of transmitting notice of ratification.⁹⁶

Whether the amendment was retroactive was the issue in *Hollingsworth v. Virginia*,⁹⁷ decided in the February term of 1798. United States Attorney General Lee submitted the question to the Court: "Whether the Amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?"⁹⁸ Rejecting arguments claiming improper form and procedure in passage of the amendment, the Court replied affirmatively to the question presented. Lee, in his argument, noted with respect to the problem of retroactivity:

A law, however, cannot be denominated retrospective, or *ex post facto*, which merely changes the remedy, but does not affect the right: In all the states, in some form or other, a remedy is furnished for the fair claims of individuals against the respective governments. The amendment is paramount to all the laws of the union; and if any part of the judicial act is in opposition to it, that part must be expunged. There can be no amendment of the constitution, indeed, which may not, in some respect, be called *ex post facto*; but the moment it is adopted, the power that it gives, or takes away, begins to operate, or ceases to exist.⁹⁹

In conclusion, the reporter noted:

The Court, on the day succeeding the argument, delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.¹⁰⁰

The immediate effect of the amendment was the dismissal of all suits pending against states that had been brought before the Supreme Court by private citizens. The Court in *Hollingsworth* referred to the purpose of the amendment as restricting federal

⁹⁶ JACOBS at 67.

⁹⁷ 3 U.S. (3 Dall.) 378 (1798).

⁹⁸ *Id.*

⁹⁹ *Id.* at 381-82.

¹⁰⁰ *Id.* at 382.

jurisdiction in areas where such jurisdiction had been expressly conferred.¹⁰¹ Attorney General Lee had argued in support of the retroactive application of the amendment: "From the moment those who gave the power to sue a state, revoked and annulled it, the power ceased to be a part of the constitution; and if it does not exist there, it cannot in any degree be found, or exercised elsewhere."¹⁰² The Court, in adopting this position, acknowledged that the Constitution had in fact given the federal judiciary authority over disputes arising between states and citizens of another state and that it took a constitutional amendment to abrogate such power. Prior to the ratification of the eleventh amendment, the states lost on the jurisdictional issue in every case brought against any of them by individual citizens. Adoption of the United States Constitution by the states mandated the relinquishment of a part of the sovereignty of each state. Recognition of this surrender of authority was explicit in the opinions of the majority justices in *Chisholm*. Only constitutional rescission of the power could return to the states a part of the sovereignty they asserted was inherently theirs.

II. SUPREME COURT INTERPRETATION OF THE AMENDMENT

States' rights had been a prime political issue through the first struggling years of the nation's development. *Chisholm* was a severe setback to the states' rights theorists who continued to clash with Federalists over the concept of a strong national government. The eleventh amendment, though a clear victory for states' rights advocates, was not as decisive as they assumed. Three major decisions would soon redefine the role of the federal judiciary, shaping it into a strong national system preeminent over state judiciaries in federal matters.

A. Early Cases

Gideon Olmstead and other American seamen had been impressed into the British Navy in 1778. They overcame their captors and steered the British sloop back to the States where it was overtaken by an armed brig belonging to the State of Pennsylvania. Olmstead claimed the vessel as a war prize, but the Pennsylvania admiralty court awarded him only a one-fourth interest. The remainder was divided between the state and others assisting in the

¹⁰¹ *Id.* at 381.

¹⁰² *Id.*

sloop's capture. On appeal to the Committee of Appeals of the Continental Congress, Olmstead's claim was sustained. The admiralty court refused to recognize the decision and ordered proceeds of the sale of the sloop be put in custody of the state treasurer. Olmstead brought suit against the treasurer's heirs in federal district court and, in 1803, Judge Richard Peters ruled in his favor. The Pennsylvania Governor, condemning Judge Peter's action, asserted the eleventh amendment as barring such a suit since the state was the real defendant in the case, even though not so named.¹⁰³ Pandemonium followed in the state legislature where a lengthy resolution was introduced urging disobedience of the court order.¹⁰⁴ The pressure was more than Judge Peters dared to confront, and he dropped the issue. But Olmstead wanted his money, and in 1808 he petitioned the Supreme Court for a writ of mandamus compelling Judge Peters to execute the judgment. Chief Justice Marshall, in *United States v. Peters*¹⁰⁵ delivered the unanimous opinion the following year, commanding Peters to execute the order. This was a devastating blow to the states and their claim of sovereignty. Marshall declared, in his opinion:

If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.¹⁰⁶

It was the Supreme Court that held the power to determine the limits of federal judicial authority, not the state legislatures.¹⁰⁷

Chief Justice Marshall made it clear that orders of the federal courts must be obeyed by the states. A federal decision was binding upon all those affected by it, including the state. Marshall, however, in rejecting the claim of immunity, took great care to distinguish this case from one that operated directly against the state and thus was barred by the eleventh amendment. While Pennsylvania claimed the money from the sale of the sloop, it was in the hands of her treasurer in his own name.¹⁰⁸ He intimated that

¹⁰³ *United States v. Peters*, 9 U.S. (5 Cranch) 115, 115-35 (1809).

¹⁰⁴ *Id.* at 122-24.

¹⁰⁵ 9 U.S. (5 Cranch) 115 (1809).

¹⁰⁶ *Id.* at 136.

¹⁰⁷ *Id.* at 139.

¹⁰⁸ *Id.* at 140.

had Pennsylvania had a legal right to the money, a different question would have been presented to the Court.¹⁰⁹

Martin v. Hunter's Lessee,¹¹⁰ involved the enforcement of a judgment recognizing Martin's title in some Virginia lands known as Northern Neck. The United States Supreme Court had reversed the ruling of the Virginia Court of Appeals which had found Virginia had perfected title in Northern Neck prior to the grant to Hunter.¹¹¹ The Virginia Court refused to obey the Supreme Court's order to enter judgment for Martin, finding section twenty-five of the Judiciary Act unconstitutional.¹¹² While this case dealt with the Judiciary Act and not the eleventh amendment, its effect in asserting the supremacy of the federal judiciary should not be understated. Justice Story, delivering the opinion of the Court, dispelled any doubts existing about the authority vested in the federal courts. He affirmed the appellate jurisdiction of the Court over state cases involving federal statutory and constitutional issues:

It has been argued, that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning . . .¹¹³

*Cohens v. Virginia*¹¹⁴ rounded out the trilogy of early nineteenth century decisions establishing the supremacy of the federal judiciary. The case arose during a time when secessionist views were becoming more prevalent.¹¹⁵ Chief Justice Marshall dealt a critical blow to these states' rights supporters with his opinion in *Cohens*, declaring the surrender of state sovereignty, "in many instances, where the surrender can only operate to the benefit of

¹⁰⁹ *Id.* at 141.

¹¹⁰ 14 U.S. (1 Wheat.) 304 (1816).

¹¹¹ *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812).

¹¹² Act of Sept. 9, 1789, ch. 20, § 25, 1 Stat. 85.

¹¹³ 14 U.S. (1 Wheat.) at 342-43.

¹¹⁴ 19 U.S. (6 Wheat.) 264 (1821). The court's appellate jurisdiction under section twenty-five of the Judiciary Act was sustained with regard to review of state criminal proceedings.

¹¹⁵ The case was decided at a time when the right of a state to secede from the Union was being forcefully asserted. W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 32-33 (1970).

the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution.”¹¹⁶ Marshall stated it was the duty of the government to maintain these principles, and this could be accomplished through the judicial department that had jurisdiction of all cases arising under the constitution and laws of the United States. “From this general grant of jurisdiction,” he continued, “no exception is made of these cases in which a state may be a party We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case.”¹¹⁷

Virginia raised the eleventh amendment as a defense in *Cohens*, but the court rejected it, finding that while a state was not suable without its consent, here Virginia had consented.¹¹⁸ If the state surrendered part of its sovereignty in an instrument, “it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.”¹¹⁹

Peters, *Martin*, and *Cohens* all broadened the scope of federal judicial power at the expense of state sovereignty. It was apparent that the Court interpreted the Constitution as limiting the power of the states in favor of a strong national government. If there had been no eleventh amendment restricting the Court, it is likely that the states would have been found amenable to suit under all circumstances. Indeed, Marshall’s language in *Cohens* suggests such a result;¹²⁰ it is diminished only by prior language finding a waiver of sovereignty.¹²¹ Although bound by the eleventh amendment, the Court gave it the narrowest construction possible to lessen its impact on the Court’s jurisdiction and ultimately on its ability to render justice.

The federal judicial system was firmly entrenched as superior to the state tribunals in federal matters as a result of these three cases. The Court then began to interpret the eleventh amendment

¹¹⁶ 19 U.S. (6 Wheat.) at 382.

¹¹⁷ *Id.* at 282-83.

¹¹⁸ Virginia’s consent was found inherent in her adoption of the United States Constitution. The document, by its nature, was to be supreme in all applicable areas. *See generally* the discussion by the Court at *id.* 378-89.

¹¹⁹ *Id.* at 380.

¹²⁰ *Id.* at 382.

¹²¹ *Id.* at 380.

itself in light of this strong national judiciary. Chief Justice Marshall's opinion in *Osborn v. Bank of the United States*¹²² was unequivocal in its support of the broad role of the federal courts. The amendment was given the most limited construction possible as Marshall stated:

It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record.¹²³

Marshall himself had difficulty confining the eleventh amendment to such a narrow interpretation and soon construed it to extend to the governor of a state. *Governor of Georgia v. Madrazo*¹²⁴ signified a definite departure from the limited holding in *Osborn*. Madrazo had sued the Georgia governor for the return of slaves allegedly wrongfully taken from him and for the proceeds received from sale of other slaves to which he claimed ownership. Marshall noted that the money demanded was in the state treasury mixed with other state funds. He felt it significant that neither the money nor the slaves had come into possession of the government by violation of any act of Congress.¹²⁵ Thus no allegation could be

¹²² 22 U.S. (9 Wheat.) 738 (1824). The president, directors, and company of the Bank of the United States sought an injunction in the lower court against Ralph Osborn, Auditor of the State of Ohio, to restrain him from acting against the complainants under an act of the Ohio Legislature, passed February 8, 1819, and entitled: "An act to levy and collect a tax from all banks, and individuals, and companies, and associations of individuals that may transact banking business in this State, without being allowed to do so by the law thereof." That act stated that the Bank of the United States was acting contrary to state law and, if it continued to do so beyond September first of that year, would be liable to an annual tax of fifty thousand dollars for each office. The State Auditor was given the authority to charge the tax to the Bank and to swear out a warrant for its collection. If the tax was not paid he could levy on the Bank's assets and sell them if necessary.

The injunction was issued, but a tax collector subsequently dispatched by Osborn seized from the Chillicothe office of the Bank \$100,000 in specie and bank notes. The money was delivered to the State Treasurer or Osborn, both of whom allegedly had notice of the illegal seizure. Osborn and the tax collector were later ordered by the court to return the money with interest to the Bank. The case in the United States Supreme Court was an appeal from that decree. *Id.* at 739-44.

¹²³ *Id.* at 857.

¹²⁴ 26 U.S. (1 Pet.) 110 (1828).

¹²⁵ *Id.* at 123. Madrazo's vessel with its cargo of slaves was captured by a cruiser commanded by an American citizen within the jurisdiction of American waters. The vessel and slaves were taken to Amelia Island and condemned by a mock Court

made that any official had acted in an unlawful manner that might nullify the protection of the eleventh amendment. Marshall found the claim against the governor to have been made in his official capacity and that no decree could be rendered against him personally. "In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant."¹²⁶

B. The Post-Civil War Period

Nearly fifty years passed before another major decision involving the eleventh amendment was rendered by the court. These fifty years saw one of the most bitter wars in American history fought, in part, over the question of states' rights. The Civil War resulted in a stronger national government at the expense of state sovereignty; the judiciary could be expected to mirror the result.

In *Davis v. Gray*,¹²⁷ the Supreme Court reaffirmed the doctrines of *Osborn*, thus permitting the suit even though Davis, Governor of Texas, had been made a party.¹²⁸ *Davis* foreshadowed fu-

of Admiralty. The vessel and cargo were sold to one Bowen who took them into Florida. When found within the limits of the State of Georgia, they were seized by a United States customs officer and delivered to an agent of the Georgia governor under authority of a state legislative act passed in accordance with the provisions of the Act of Congress of March 1807, which prohibited the importation of slaves into the United States. Some of the slaves were then sold by the governor and proceeds of the sale were paid over to the Georgia treasurer. The remaining slaves were held in possession of an agent of the governor. The governor filed suit to obtain their forfeiture so they could be sold and prevailed in district court. The case reached the Supreme Court on appeal from the dismissal of *Madrazo's* suit for return of the slaves which he claimed had been taken from him improperly and for the return of the proceeds of those slaves already sold. *Id.* at 110-12.

¹²⁶ *Id.* at 123-24.

¹²⁷ 83 U.S. (16 Wall.) 203 (1872). The State of Texas had given public lands to a company for the building of a railroad. When the company became insolvent before completing the railroad, the state attempted to recover the lands. The lower court decided that the secession of the state from the Union had made it impossible for the company to fulfill the conditions that were therefore abrogated. *Id.* at 204-15.

¹²⁸ *Davis* and *Madrazo* are distinguishable as the Texas governor invoked an invalid law in support of his position while the Court expressly noted that the Georgia governor had not violated any law nor acted on the basis of any unconstitu-

ture developments¹²⁹ broadening the area of permissible suits against state officers. The conditions prerequisite to such suits, as the Court found them expressed in *Osborn*, included a finding that the officer was acting under an unconstitutional state or federal law.¹³⁰ The Court also found that "making a State officer a party does not make a State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view"¹³¹

The nominal party doctrine of *Osborn* was last asserted in 1882.¹³² The definitive question then became whether the state was the real party in interest. If so, the state, even though not named in the complaint as a party defendant, could claim immunity.¹³³ The Court, while acknowledging the basic principle of state immunity, qualified its previous holding, finding such immunity to exist only when the state was an indispensable party.¹³⁴ The mere assertion of the immunity defense was not sufficient, however. An officer charged with a wrongful act had to make an affirmative showing that it was the state's act, not his, that caused the injury. He was required to show the validity of the state law under which he acted in order successfully to assert immunity.¹³⁵ Such was the

tional statute. The distinction is crucial to the understanding of the Court's reasoning in applying eleventh amendment immunity. The theory would not be fully expressed until *Ex parte Young*, 209 U.S. 123 (1908), when the Court created the fiction that an officer acting under an unconstitutional statute or in violation of a statute was acting in a personal capacity and therefore could be sued while the officer not acting outside his authority was not personally liable and enjoyed the state's sovereign immunity.

¹²⁹ See *Ex parte Young*, 209 U.S. 123 (1908).

¹³⁰ 83 U.S. (16 Wall.) at 220.

¹³¹ *Id.*

Extension of jurisdiction of suits against officers continued in *Board of Liquidation v. McComb*, 92 U.S. 531 (1875), when the Court found an officer performing a purely ministerial duty could be compelled by mandamus to perform that duty when his refusal to do so would cause personal injury. No defense was presented by a showing that the officer acted pursuant to an unconstitutional law in failing to perform his duty for "an unconstitutional law will be treated by the courts as null and void." *Id.* at 541.

¹³² *United States v. Lee*, 106 U.S. 196 (1882).

¹³³ *Louisiana v. Jumel*, 107 U.S. 711, 727 (1883); *New Hampshire v. Louisiana*, 108 U.S. 76, 89 (1883); *Hagood v. Southern*, 117 U.S. 52, 67 (1886).

¹³⁴ *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 457 (1883). The limits of *United States v. Lee*, 106 U.S. 196 (1882), were examined and defined by the Court, 109 U.S. at 452, and the soundness of *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1872), was questioned. 109 U.S. at 453.

¹³⁵ *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885).

status of the law when *In re Ayers*¹³⁶ was decided in 1887. The Court, finding “that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record . . .”¹³⁷ decided that a suit against a state officer was not barred when his wrongful action was an individual act, such as a trespass, but if his offense was something that only the state acting through one of its officers could do, then the official’s defense that the suit was one against the state would be sustained.¹³⁸ While such a result seems reasonable when viewed in terms of immunity attaching when the state is the real party in interest, it fails to anticipate the problem that arises when violation of the fourteenth amendment becomes an issue. By its terms, only a state can violate the fourteenth amendment, and, if the state is immune from suit when it is the real party in interest, then, by necessity, it is immune from suit anytime it is in violation of the fourteenth amendment. While the problem did not arise in *Ayers*, the conflict was inevitable.

Inferences of potential problems arising from assertion of eleventh amendment immunity raised in the face of fourteenth amendment violations first surfaced in 1903 in *Prout v. Starr*.¹³⁹ While the eleventh amendment was found inapplicable in this case,¹⁴⁰ the Court warned of the dangers in permitting it to be asserted so as to nullify other provisions of the Constitution which accord specific powers to Congress.¹⁴¹ The Court’s language was explicit; it saw the

¹³⁶ 123 U.S. 443 (1887).

¹³⁷ *Id.* at 487, quoting *Poindexter v. Greenhow*, 114 U.S. 270, 287 (1885).

¹³⁸ 123 U.S. at 488-89.

¹³⁹ 188 U.S. 537 (1903).

¹⁴⁰ *Id.* at 542-43. The Court held that the jurisdictional question had been decided in a prior decision dealing with the same factual situation. *Smyth v. Ames*, 169 U.S. 466, 518-19 (1898):

[W]ithin the meaning of the Eleventh Amendment of the Constitution, the suits are not against the State but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment.

¹⁴¹ The Court noted:

It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several

problem and cautioned against the inherent evils of applying the eleventh amendment without regard for the nature of the controversy, but not having been expressly presented with the question here, such fears could only be embodied in dicta to await a more direct controversy.¹⁴²

The question was squarely presented only five years later, in *Ex parte Young*,¹⁴³ when the Minnesota legislature passed a law reducing railroad rates accompanied by severe penalties for all who refused to comply.¹⁴⁴ Suit was brought by stockholders of several of the railroads to enjoin their respective companies from complying with the law on the basis that the new rates were unreasonable and confiscatory and, thus, would result in a deprivation of company property without the due process of law required by the fourteenth amendment.¹⁴⁵ Edward T. Young, Attorney General of Minnesota, was included among the defendants. The injunction was issued over Young's objection that the suit was, in fact, one against the state, and since the state had not consented, the suit was barred by the eleventh amendment.¹⁴⁶ The Court found the injunction proper. Justice Peckham, writing for the Court, set forth the rule that has been consistently followed:

The . . . use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of the state official. . . . If the act which the state Attorney General seeks to enforce be a violation

States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by state enactments.

188 U.S. at 543.

¹⁴² *Id.*

¹⁴³ 209 U.S. 123 (1908).

¹⁴⁴ *Id.* at 127-28.

¹⁴⁵ *Id.* at 130.

¹⁴⁶ *Id.* at 132.

of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of the Constitution, and he is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct.¹⁴⁷

The decision opened up an entire new era of judicial actions. While the railroads would have been without relief had the Court found against them, of far more significance is the decision's impact on constitutional law in general. Without *Young*, there would be no effective method of challenging the constitutionality of a statute. Any such suit must necessarily be brought against the state in some manner. The eleventh amendment continues to bar direct suits against the state, but when styled in the name of her officers, constitutional assaults upon the validity of a statute have proceeded without interference.

Young has had the most profound effect upon state sovereign immunity, but several other cases dealing with collateral issues in the interpretation of the eleventh amendment have had a significant impact. *Hans v. Louisiana*¹⁴⁸ extended the amendment's prohibition against suit to citizens of the state being sued. Though the language of the amendment does not expressly extend to such suits, the Court felt the reasoning¹⁴⁹ in the passage of the amendment required such a result. While a state has immunity even when confronted by its own citizens, only the state can claim the immunity. A state-owned corporation was found liable to suit in

¹⁴⁷ *Id.* at 159-60. Justice Harlan, in his dissenting opinion, argued that the suit was, as to the defendant *Young*, one against him *as, and only because he was*, Attorney General of Minnesota. No relief was sought against him individually but only in his capacity *as* Attorney General. And the manifest, indeed the avowed and admitted, object of seeking such relief was *to tie the hands of the State* so that it could not in any manner or by any mode of proceeding, *in its own courts*, test the validity of the statutes and orders in question. It would therefore seem clear that within the true meaning of the Eleventh Amendment the suit brought in the Federal court was one, in legal effect, against the State—as much so as if the State had been formally named on the record as a party—and therefore it was a suit to which, under the Amendment, so far as the State or its Attorney General was concerned, the judicial power of the United States did not and could not extend.

Id. at 174. For comment on Justice Harlan's dissent see W. LOCKHART, Y. KAMISAR & J. CHOPER, *supra* note 115, at 40.

¹⁴⁸ 134 U.S. 1 (1890).

¹⁴⁹ *Id.* at 15.

Hopkins v. Clemson Agricultural College.¹⁵⁰ The Court, recognizing the sovereignty of the state, could find no sovereignty in the corporation operated by agents of the state. Acts of the agents caused the injury, and they must bear the responsibility for their wrong. Counties were also found amenable to suit in *Lincoln County v. Luning*,¹⁵¹ in which the Court held that the language of the amendment could not be construed beyond its express wording which mentioned only states.¹⁵² Apparently the Court found a different way to read the amendment in the short time before the *Hans* case was decided.

Waiver of the states' immunity has long been recognized,¹⁵³ however, such a waiver must be express and cannot be effected solely on the ground that the case arises under the Constitution or laws of the United States.¹⁵⁴ Waiver must be express and in accordance with state law.¹⁵⁵ A waiver is not to be lightly inferred, nor does consent to suit in state court constitute consent to suit in federal court.¹⁵⁶ One apparent exception can be found to this gen-

¹⁵⁰ 221 U.S. 636 (1911).

¹⁵¹ 133 U.S. 529 (1890).

¹⁵² The test of whether a state agency can be sued in federal court is the presence or nonpresence of the state as the real party in interest. *Whitten v. State Univ. Constr. Fund*, 493 F.2d 177 (1st Cir. 1974). "Whether the Action is a suit against a state within the meaning of the amendment is to be determined by the character of the proceeding and the relief sought rather than the mere names of the titular parties to the litigation." *Kirker v. Moore*, 308 F. Supp. 615, 624 (S.D.W. Va. 1970), *aff'd*, 436 F.2d 423 (4th Cir. 1971), *cert. denied*, 404 U.S. 824 (1971).

State law determines whether an agency of the state is the "alter ego" of the state. *Harris v. Tooele County School Dist.*, 471 F.2d 218, 220 (10th Cir. 1973). Two tests have been used to determine this: (1) whether the action could affect the treasury of the state; (2) whether, when an action is sought to be compelled or enjoined, full relief can be obtained from the named defendant without requiring the state to take affirmative action. If the state is required to take affirmative action, then the agency is the alter ego of the state. *21 Properties, Inc. v. Romney*, 360 F. Supp. 1322, 1325 (N.D. Tex. 1973). Although no single factor is determinative of the question of extending state immunity to an agency, *United States Steel Corp. v. Multistate Tax Comm'n*, 367 F. Supp. 107 (S.D.N.Y. 1973), the financial liability test appears to be the strongest indicator of state interest in the litigation. See *Edelman v. Jordan*, 415 U.S. 651 (1974); *Dugan v. Rank*, 372 U.S. 609 (1963); *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973); *Woody v. Chesapeake Beach Park, Inc.*, 57 F.R.D. 525 (D. Md. 1972).

¹⁵³ See, e.g., *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

¹⁵⁴ *Parden v. Terminal Ry.*, 377 U.S. 184, 186 (1964).

¹⁵⁵ *Murray v. Wilson Distilling Co.*, 213 U.S. 151 (1909).

¹⁵⁶ *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959).

eral rule; when the state engages in certain activities under which a cause of action is expressly created by federal statute.¹⁵⁷

C. The Current Scene

1. *Edelman v. Jordan*

No major developments occurred in the interpretation or application of the eleventh amendment until early in 1974, when the Supreme Court decided *Edelman v. Jordan*.¹⁵⁸ Illinois state and county welfare officials were sued for administering public assistance programs in accordance with state regulations that conflicted with, and were less favorable to recipients than, the federal regulations. It was alleged that the program was administered in violation of the fourteenth amendment and the appropriate federal regulations. Declaratory and injunctive relief was sought. The district court declared the Illinois regulations invalid where inconsistent with the federal regulations and granted a permanent injunction requiring state compliance with the federal regulations.¹⁵⁹ The district court also ordered the officials to pay the benefits wrongfully withheld.¹⁶⁰ The United States Court of Appeals affirmed.¹⁶¹ The United States Supreme Court reversed that portion of the Court of Appeals decision that affirmed the district court's order that retroactive benefits be paid by the Illinois officials.¹⁶² Justice Rehnquist, writing for the majority, held that the federal court's remedial power is limited by the eleventh amendment to prospective injunctive relief and may not include an award of retroactive benefits to be paid from the treasury.¹⁶³ He stated that "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."¹⁶⁴

The *Edelman* decision cited with approval the observations of Judge McGowan in *Rothstein v. Wyman*,¹⁶⁵ dealing with the retro-

¹⁵⁷ See, e.g., *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), where consent to suit in federal court was found implicit in the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1970).

¹⁵⁸ 415 U.S. 651 (1974).

¹⁵⁹ *Id.* at 656.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 658. *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973).

¹⁶² 415 U.S. at 659.

¹⁶³ *Id.* at 677.

¹⁶⁴ *Id.* at 663.

¹⁶⁵ 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973).

active payment of benefits:

It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.¹⁶⁶

Justice Rehnquist examined the background of the amendment and, entertaining the question of its applicability in the instant case, quoted from a prior decision of the Court: "When the action is in essence one for the recovery of money from the State, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."¹⁶⁷

The Court then considered the effect of *Young* on the case at bar but concluded that it extended only to prospective injunctive relief. It was concerned with the retroactive part of the district court's award which "requires the payment of a very substantial amount of money which that court held should have been paid, but was not. . . ."¹⁶⁸ The Court found it significant that the funds would not come from the state officials themselves but rather would come from the Illinois state treasury. The Court thus found that "the award resembles far more closely the monetary award against the State itself, *Ford Motor Co. v. Department of Treasury* . . . than it does the prospective injunctive relief awarded in *Ex parte Young*."¹⁶⁹

Recognition was made of the fact that *Young* had probably affected the state treasury in some way, and subsequent cases likely permitted an even greater impact upon state revenues. However, the Court found the district court's decision to extend far beyond any previous cases. The award required payment of state funds as compensation for injuries resulting from the improper administration of the welfare program rather than a mere consequential monetary effect occasioned by a court-ordered change in administrative procedures to operate only in the future.¹⁷⁰

¹⁶⁶ *Id.* at 236-37.

¹⁶⁷ *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945).

¹⁶⁸ 415 U.S. at 664.

¹⁶⁹ *Id.* at 665.

¹⁷⁰ *Id.* at 668.

The impact of *Edelman* cannot be overstated. The Court even went so far as to overrule portions of prior decisions awarding some monetary relief against states as inconsistent with the tenor of the eleventh amendment.¹⁷¹ It was noted that the amendment had only been considered in one of the cases and was given superficial treatment there.¹⁷² Any liberalization in the Court's attitude toward the awarding of money damages against states and their officers was effectively choked by the decision. The Court made it evident that it would go no further in eroding the immunity doctrine than to permit injunctive relief as contemplated in *Young*.¹⁷³

Another distinction was made from former cases permitting suit where the cause of action was created by Congress.¹⁷⁴ No Congressional intention to abrogate state immunity was found in the federal welfare program, and since constructive consent was not sufficient to waive a constitutional immunity, state immunity remained unabated.¹⁷⁵

¹⁷¹ *Id.* at 670-71. *Shapiro v. Thompson*, 394 U.S. 618 (1969), is the only case that the Court recognized as presenting the eleventh amendment objection to retroactive relief upon oral argument. The Court affirmed the judgment, however, without dealing with the issue substantively. Summary affirmations of lower federal court decisions that ordered payment of retroactive benefits and in which the eleventh amendment defense was raised also included: *Sterrett v. Mothers' & Children's Rights Organization*, 409 U.S. 809 (1972), *aff'g* unreported order and judgment of the district court (N.D. Ind. 1972) *on remand from* *Carpenter v. Sterrett*, 405 U.S. 971 (1972); *State Dep't of Health & Rehab. Serv. v. Zarate*, 407 U.S. 918 (1972), *aff'g* 347 F. Supp. 1004 (S.D. Fla. 1971); *Gaddis v. Wyman*, 304 F. Supp. 717 (S.D.N.Y. 1969), *aff'd per curiam sub nom.*, *Wyman v. Bowens*, 397 U.S. 49 (1970).

All of the above cases were disapproved to the extent that their holdings were inconsistent with the holding in *Edelman v. Jordan* on the eleventh amendment issue, 415 U.S. at 652.

¹⁷² *Id.* at 670-71.

¹⁷³ *Id.* at 677.

¹⁷⁴ *Id.* at 671-72. The Court referred specifically to *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), where a cause of action was created under the Federal Employers Liability Act, and *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), involving a compact between the two named states.

The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.

415 U.S. at 672.

¹⁷⁵ *Id.* at 671-72. In *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944), the Court noted: "[W]hen we are dealing with the sovereign exemption from judicial

One more important question was treated in the majority opinion. Consideration was given to the effect of section 1983 in face of the eleventh amendment.

[I]t has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury¹⁷⁵

The Court thus acknowledged the potential conflict between section 1983¹⁷⁷ and the eleventh amendment but found the force of the latter superior. As section 1983 was enacted to implement the fourteenth amendment, it could be argued that they are of equal force if one considered only the language of each. However, the historical basis of section 1983 casts it into a different context, permitting the result which the Court reached and causing the inequities that exist in the area of civil rights.

2. *The Civil Rights Acts*

The Ku Klux Klan Act, adopted April 20, 1871,¹⁷⁸ established civil liabilities for the deprivation of civil rights that now find expression in section 1983. The Senate amended the original House version of the bill, making cities and counties where violence occurred liable in damages to the persons injured. The House refused to accept the Senate version until the amendments were watered

interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

¹⁷⁵ *Id.* at 675-77. Compare *Rosado v. Wyman*, 397 U.S. 397 (1970), permitting suits in federal court under section 1983 to secure state compliance with provisions of the Social Security Act.

¹⁷⁷ 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¹⁷⁸ Act of April 20, 1871, ch. 22, 17 Stat. 13.

down to provide liability only in case of conspiracy to violate civil rights. Representative John Farnsworth presented one of the strongest arguments against the Senate amendments as he attacked them on the basis that Congress had no authority to “confer any power or impose any duty upon the county or city. Can we then impose on a county or other State municipality where we cannot require a duty? I think not.”¹⁷⁹ Senator George Edmunds found the bill as passed afforded substantially the same relief as the prior Senate bill. The citizen’s remedy against those conspiring to deprive one of his civil rights was as “effective as the redress against the county, without liability against the inhabitants of it, would have been.”¹⁸⁰

When viewed in its historical context, section 1983 loses much of its effect. The House would not adopt the bill as long as counties and cities were to be liable for deprivations of civil rights occurring within their boundaries. While the rejected bill may have encompassed a liability that was too broad, it remains that the Act was adopted without provision for any county or city liability. Though section 1983 has been an effective weapon in the crusade to protect civil rights, to extend it to situations involving counties or cities is to deny the obvious intention of its drafters.¹⁸¹

¹⁷⁹ STATUTORY HISTORY OF THE UNITED STATES, CIVIL RIGHTS, PART I 652 (B. Schwartz ed. 1970).

¹⁸⁰ *Id.* at 653.

¹⁸¹ *Moor v. County of Alameda*, 411 U.S. 693 (1973), decided the question of whether a county was a suable person under section 1983 in the negative. The Court relied upon *Monroe v. Pape*, 365 U.S. 167 (1961), for its holding, saying:

In *Monroe*, the Court, in examining the legislative evolution of the Ku Klux Klan Act of April 20, 1871, which is the source of § 1983, pointed out that Senator Sherman introduced an amendment which would have added to the Act a new section providing expressly for municipal liability in civil actions based on the deprivation of civil rights. Although the amendment was passed by the Senate, it was rejected by the House, as was another version included in the first Conference Committee report. The proposal for municipal liability encountered strong held views in the House on the part of both its supporters and opponents, but the root of the proposal’s difficulties stemmed from serious legislative concern as to Congress’ constitutional power to impose liability on political subdivisions of the States.

[I]t cannot be doubted that the House arrived at the firm conclusion that Congress lacked the constitutional power to impose liability upon municipalities Thus, § 1983 is unavailable to these petitioners insofar as they seek to sue the County.

411 U.S. at 707-10.

The historical problems facing one bringing an action under section 1983 disappear when the suit is framed in the context of the Equal Employment Opportunity Act of 1972.¹⁸² EEOA amends Title VII of the 1964 Civil Rights Act¹⁸³ which gave federal district courts jurisdiction over actions brought to abate discriminatory employment practices. Section 701 of the 1964 Act expressly excluded from the definition of an employer covered by the Act: "A State or political subdivision thereof" The 1972 Act deleted this exemption and authorized the district court, upon finding an unlawful employment practice, to enjoin the defendant and order affirmative relief that includes back pay.¹⁸⁴ Conflicts between the eleventh amendment and the EEOA are manifest. The remedies EEOA provides against the state, the amendment takes away. While other political subdivisions cannot take advantage of the eleventh amendment immunity under the EEOA, if the pleader brings his action under section 1983 he faces the conclusive argument that counties and cities are not citizens for purposes of that section.¹⁸⁵ When the claim is brought against the state, the eleventh amendment knocks out the claimant under either statute. The result of all this is that the relief now believed to exist against deprivation of civil rights is, in many cases, only a fiction.

III. THE FUTURE OF THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY

While the eleventh amendment as now interpreted may be

In *Cross v. Board of Supervisors*, 326 F. Supp. 634 (N.D. Cal. 1968), *aff'd*, 442 F.2d 362 (9th Cir. 1971), plaintiff named the County of San Mateo as a defendant in the action. The court cited *Monroe v. Pape* in holding that political subdivisions of a state are immune from liability under the Civil Rights Act. The same result was reached in *Wade v. Bethesda Hosp.*, 356 F. Supp. 380 (S.D. Ohio 1973), where plaintiff named as a defendant in a conspiracy action the Muskingum County Children's Services Board. The court stated that the Board was created by state statute and was an agent of the county and, therefore, as an entity, was immune from suit under section 1983 because the suit was in actuality one against the county. Again, *Monroe* was cited as authority. The court noted that the individual defendants could not claim immunity under section 1983 as they were being sued in their individual capacities for their alleged unconstitutional actions.

See generally *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), with respect to cities not being persons for purposes of section 1983.

¹⁸² 42 U.S.C. § 2000e (1972) [hereinafter referred to as EEOA].

¹⁸³ Pub. L. No. 88-352, § 701-16, 78 Stat. 253-66.

¹⁸⁴ 42 U.S.C. § 2000e-5 (1972).

¹⁸⁵ See *Moor v. County of Alameda*, 411 U.S. 693 (1973); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

consistent with post-*Chisholm* opinion, it is inconsistent with the policy that every wrong should have a remedy. It cannot be denied that the amendment creates inconsistencies with respect to the policy enunciated in the civil rights acts of providing affirmative relief to those injured, including back pay.¹⁸⁶ No evidence has been found where Congress considered these problems. Apparently the issues were not raised prior to passage of the Acts. The problems have erupted in the courts, however, and absent congressional action, they do not appear conducive to a ready solution.

The trend today is away from sovereign immunity, and many states have abolished it judicially and legislatively.¹⁸⁷ The federal government has abolished its immunity with respect to specific claims, such as the Federal Employers Liability Act¹⁸⁸ and the Federal Tort Claims Act.¹⁸⁹ Sovereign immunity is fast becoming an anachronism in our society. Rather than destroy it piece by piece in the courts, the best approach is to repeal the eleventh amendment and establish the policy that *all* wrongs are to be

¹⁸⁶ 42 U.S.C. § 2000e-5 (1972). Attorneys' fees are also contemplated by the Act. *Id.* § 2000e-5(k).

The question of awarding attorneys' fees in an action for deprivation of civil rights under section 1983 is within the discretion of the court. Attorneys' fees are not awarded as a matter of right but normally are granted in situations where the plaintiff has acted as a private attorney general or where there has been deliberate wrongdoing on the part of the defendant. Attorneys' fees are awarded in other instances where the court deems them proper.

It seems logical that where money damages are proscribed by the eleventh amendment, an award of attorneys' fees would also be prohibited. However, the Ninth Circuit held otherwise in *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974). The private attorney general concept was discussed further in *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974).

Section 1983 makes no provision for such award, and such fees should be allowed only when public policy requires it. In *Smith v. City of East Cleveland*, 363 F. Supp. 1131, 1151 (N.D. Ohio 1973), it was stated that "[t]he Court should consider the degree to which a public right is asserted by plaintiff and the extent to which defendant has engaged in deliberate wrongdoing" in determining whether to award attorney fees. Again, the award is left in the discretion of the court.

¹⁸⁷ See Note, *Torts—Governmental Immunity in West Virginia—Long Live the King?*, 76 W. VA. L. REV. 543 (1974).

West Virginia presents a particular problem with regard to state immunity as it is incorporated into the state constitution. W. VA. CONST. art. VI, § 35. However, any abrogation of immunity in the federal system hopefully will be complete enough to encompass all federal actions without regard to a state's own claim to sovereignty.

¹⁸⁸ 45 U.S.C. §§ 51-60 (1970).

¹⁸⁹ 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1970).

compensated. Even though *Edelman* has stopped the erosion of immunity, it can be only a matter of time before the courts begin to carve out exceptions until the amendment becomes worthless. If our Constitution is to have any effect, we should follow it, and if it no longer serves our needs, we should change it, not destroy it piecemeal until the desired result is achieved. The dangers inherent in judicial constitutional amendment should alarm every citizen, not just the legal purist.

In considering abrogation of sovereign immunity, the theories behind its inception should be considered. The judiciary has taken the abstract doctrine for granted, finding it based in history that they too often have failed to explore. Justice Iredell's lengthy dissent in *Chisholm* was based on sovereign immunity as supposedly recognized under English common law.¹⁹⁰ There is a conflict among the writers whether the petition of right granting relief against the awesome sovereign was mandatory or discretionary.¹⁹¹ Regardless of the outcome of such debate, the historical argument is not very persuasive today.¹⁹²

Public policy has been another major theory of sovereign immunity.¹⁹³ Justice Davis noted over a hundred years ago that without the protection of sovereign immunity "the government would be unable to perform the various duties for which it was created."¹⁹⁴ A more recent assertion of the public policy justification came from Chief Justice Vinson: "[T]he government, as representative of the community as a whole, cannot be stopped in its tracks."¹⁹⁵ The fears expressed by these jurists have failed to materialize while the front of public policy continues to deny justice to deserving claimants injured by the state.¹⁹⁶ Public policy has not

¹⁹⁰ See notes 61-64 *supra* and accompanying text.

¹⁹¹ Compare H. STREET, *GOVERNMENTAL LIABILITY*, A COMPARATIVE STUDY 1-2, 15 (1953), arguing that the sovereign had unqualified discretion in granting or denying a petition of right, with Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183, 191 (1908), asserting the mandatory nature of the petition.

¹⁹² See Note, *The Present Status of the Eleventh Amendment*, 10 VAND. L. REV. 425, 427 (1957), citing *United States v. Lee*, 106 U.S. 196, 208 (1882).

¹⁹³ JACOBS, *supra* note 2, at 153.

¹⁹⁴ *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1869).

¹⁹⁵ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

¹⁹⁶ The theory that the eleventh amendment was passed because the states were afraid that they would have to pay Revolutionary debts owed non-citizens is strongly criticized in JACOBS, *supra* note 2, at 69-71, where he argues that most of the debts had already been paid by the time the amendment was ratified.

barred negative relief, however, as distinguished from the affirmative relief prohibited by the courts.¹⁹⁷ No rationale exists for such a distinction. If public policy requires that a state be immune from suit, such prohibition should extend to both affirmative and negative relief.

The conceptual rationale¹⁹⁸ was portrayed by Justice Holmes in his statement in *Kawananakoa v. Polyblank*, that “[a] sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”¹⁹⁹ This theory, seemingly a combination of the historical and public policy rationales, runs afoul of the ideas expressed by Justice Wilson in his *Chisholm* opinion. For him, “[t]he sovereign, when traced to his source, must be found in the *man*.”²⁰⁰ Thus the authority that makes the law would, in Wilson’s analysis, be the people, making Holmes’s argument rather absurd.

None of the above theories is realistic or workable. They all represent attempts to justify an irreconcilable position that reaches an unconscionable level in the modern world. One author suggests that the immunity rests on judicial inference rather than express constitutional command and, therefore, can be erased judicially.²⁰¹ While judicial action might provide a current solution, the only positive method of destroying the injustice inherent in

¹⁹⁷ *Pennoyer v. McConnaughy*, 140 U.S. 1, 10 (1891). The Court made a distinction between two types of suits involving the state. The first is where a suit is brought against state officials as they represent the state’s action and liability. Here the state, though not named on the record, is the real party against whom the judgment would operate, requiring it to specifically perform its contracts. The second occurs when a suit is brought against defendants who, allegedly acting as officers of the state, but under an unconstitutional statute, commit wrongs against the person or property of another. Actions of the first type are barred by the eleventh amendment but those of the second category face no such barrier.

¹⁹⁸ This term was coined in JACOBS, *supra* note 2, at 154.

¹⁹⁹ 205 U.S. 349, 353 (1907).

²⁰⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 458 (1793).

²⁰¹ The amendment’s restriction, however, is not equivalent to an affirmation of state immunity nor does it constitutionalize legal irresponsibility as a state’s right. In this perspective, a judicial construction of due process of the fourteenth amendment imposing upon the states a constitutional obligation to provide effective means of legal redress for wrongs attributable to the states would present no direct conflict with the injunction of the eleventh amendment. It would on the other hand, comport with deeply rooted sentiments that found eloquent expression in *Chisholm v. Georgia* and that have been repeated with continuing conviction, in ensuing years. JACOBS, *supra* note 2, at 164.

sovereign immunity is to abrogate the immunity constitutionally. If this nation is going to recognize a cause of action for the deprivation of civil rights and other wrongs visited upon the public by government, then there must be an accompanying effective relief, a relief that is available to all regardless of the status of the wrongdoer.

Devon L. Gosnell